SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No.

GILLETTE SAFETY RAZOR COMPANY, PETITIONER,

v.

HAWLEY HARDWARE COMPANY, RESPONDENT.

BRIEF FOR PETITIONER

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The case at bar is **one of a group of three,** all decided on the same day by the Circuit Court of Appeals for the Second Circuit and all involving the same question of contributory infringement. The decision of the Circuit Court of Appeals is reported in 64 F. (2d) 10, and is found at page 628 of the record. The decision of the District Court is reported in 60 F. (2d) 1019. The companion cases are *Gillette Safety Razor Company* v. *Standard Safety Razor Corporation*, No. 230 *, reported in 64 F. (2d) 6, decision of the District Court, 2 F. Supp. 9; and *Gillette* v. *Standard Safety Razor Corporation*, No. 338 †, reported in 64 F. (2d) 9; decision of the District Court reported in 2 F. Supp. 64. In its decision in the case at bar, the Circuit Court of Appeals adopted its decision in *Gillette* v. *Standard Safety Razor Corporation*, 64 F. (2d) 6, as far as it applies to the question of contributory infringement, saying: "The appellant is not chargeable with contributory infringement of these claims for the reasons stated in *Gillette* v. *Standard Safety Razor Corp.* decided this day in our consideration of the same Thompson patent here in suit." (Rec. p. 630.)

* Petition for writ of certiorari filed July 3, 1933.

† Docket number of the Circuit Court of Appeals.

JURISDICTION.

The date of the judgment to be reviewed is the date of the denial of the petition for rehearing, April 20, 1933, and order thereon, April 27, 1933 (Rec. pp. 637, 638). See *Citizen's Bank of Michigan City* v. *Opperman*, 249 U. S. 448. The Statute giving jurisdiction is Section 250A of the Judicial Code, 28 U. S., C. 347, as amended by the Act of February 13, 1925.

ASSIGNMENT OF ERRORS TO BE URGED.

The errors to be urged are:

(1) The Circuit Court of Appeals erred in reversing the District Court and holding that the sale of razor blades by the defendant with the knowledge and intent that they were to be used in plaintiff's patented razors did not constitute contributory infringement of the Thompson patent in suit.

(2) The Circuit Court of Appeals erred in holding that claims 1 and 3 of the Gaisman patent in suit were not infringed by the defendant.

STATEMENT.

This suit is brought on two patents, Thompson No. 1,815,745 (Rec. p. 221), claims 1, 2, 4, 5, 7 and 8, which are the same patent and claims as were in suit in *Gillette Safety Razor Company* v. *Standard Safety Razor Corporation*, No. 230 *, and on the patent to Gaisman No. 1,633,739 (Rec. p. 226), claims 1 and 3.

Only matters pertaining to the infringement of claims 1 and 3 of the Gaisman patent are set forth herein, as the matters relating to the question of contributory infringement are fully presented in the petition and brief in *Gillette Safety Razor Company* v. *Standard Safety Razor Corporation* No. 230 *, to which the court is respectfully referred.

The inventions of both patents in suit are embodied in the well-known Gillette safety razors in their present form.

* Docket number of this Court.

1. As to Contributory Infringement of the Thompson Patent and of Claim 3 of the Gaisman Patent—This Matter is Fully Covered in Our Brief in Gillette Safety Razor Company *v.* Standard Safety Razor Corporation, No. 230, and is Not Discussed Again Herein.

2. As to Direct Infringement of Claim 1 of the Gaisman Patent.

The invention of the Gaisman patent is an improvement on razors of the Gillette type. Such razors are composed of a handle, a curved guard, a correspondingly curved cap, and a thin flexible blade which is bent when clamped between the cap and guard (Rec. p. 226). The parts must be made with extreme accuracy since variation in the location of the cutting edge of the blade of more than 4/1000th of an inch on either side of the preferred or normal position renders the razor useless—either the razor will not shave or the blade will protrude so far that the user will cut himself (Rec. p. 164-5). Looseness of fit between the cap and guard or between the blade and these parts will affect the position of the edge of the blade. The total result of all these errors must be less than the amount stated above; hence, the necessity for accuracy.

Before Gaisman's invention it was customary to position the cap and blade by pins on the underside of the cap which passed through holes in the blade into holes in the guard. Such a razor is conveniently referred to as an "Old Style Gillette". A razor having this means of securing the blade in position between the cap and the guard is shown in the patent to Thompson No. 1,814,745 (Rec. p. 221). If the holes in the guard or in the blade fit the pins loosely, the blade may project too much on one side of the razor and not enough on the other, or the blade may be askew in the razor. Under these conditions the razor gives an unsatisfactory shave. To avoid these difficulties, extreme precision at large cost was necessary in manufacture. The permissible variation was less than one-thousandth of an inch—less than the thickness of a sheet of this paper.

Gaisman's invention consists in an altogether different way of locating the blade in the razor, which results in greater accuracy at less cost. In the Gaisman razor of the patent in suit, the blade is positioned on the guard by a diamond-shaped lug which extends into a diamond-shaped hole in the blade, and the cap is located on the blade and, consequently on the guard, by pins or lugs on the cap which fit into notches on the ends of the blade *but do not touch the guard*. As far as positioning is concerned, the cap and guard are entirely independent of each other; the blade is the connecting link between the two other parts (Rec. p. 203). A razor constructed in this manner is more accurate than the Old Style Gillette because the blade cannot move toward one side of the guard while the cap moves toward the other producing a greater projection of the blade edge on one than on the other side of the cap. The invention reduced the possible error about one third (Rec. p. 165, fol. 495) and improved the average shaving qualities about one-third (Rec. p. 166, Q. 54).

Claims 1 and 3 of the Gaisman patent are as follows:

> 1. A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to cooperate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member.
>
> 3. A safety razor comprising blade clamping members, a blade, means cooperative between one of said members and said blade to retain the latter in shaving relation to said member, said blade and the other member having cooperative means whereby the blade will retain said member in an operative position respecting the blade, and means to detachably clamp the blade between said members. (Rec. p. 228.)

Defendant's blade is shown in the sketch at the lower corner of page 13. As appears at a glance, it is only colorably different from that of the Gaisman patent also shown on page 13 of this brief.

Defendant's blade has two diamond-shaped openings which

are spaced equidistantly from the center instead of a single diamond shaped opening. The two openings fit the two lugs on the guard just as Gaisman's single opening fits the single lug on his guard. Defendant's blade also has four corner notches which fit the corner lugs on the cap, so that the cap is positioned on the guard by the blade, exactly as in the patent in suit, the only difference being that the notches are at the corners of the blade instead of in the curved ends. The only differences over the patent in suit are (1), the provision of two diamond-shaped holes in the blade and two lugs on the guard instead of one, (2) the slight change of location of these elements made necessary only because of their duplication, and (3) the slight change in position of the notches in the blade and of the interfitting corner lugs on the cap. These changes produced no difference in function or mode of operation. ***Defendant's blade is the sole element which positions the cap with respect to the guard.*** The changes, therefore, do not avoid infringement. The form is slightly different but the substance of the invention has been appropriated.

Notwithstanding these facts, which seem to counsel incontrovertible, the Circuit Court of Appeals (Judge Manton) came to three mistaken conclusions:

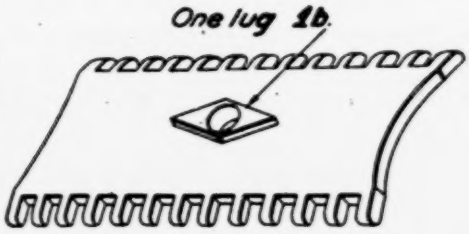
Point 1. Defendant's blade is constructed to act as the connecting link between the cap and guard and positions the two parts with relation to each other. It has the same construction and mode of operation as the blade covered by claim 1. The Court of Appeals should have held that claim 1 was infringed by defendant's blade.

As already pointed out, Gaisman's invention consisted in employing the blade to fix the cap in proper shaving relation on the guard instead of providing pins on the cap which pass through holes in the blade into holes in the guard. The idea of using the blade to position the cap on the guard was entirely novel. It resulted in a much more accurate razor and a better shaving one. It permits the manufacture of a razor by less accurate methods and hence a better razor for the same money or equally accurate razor for less money.

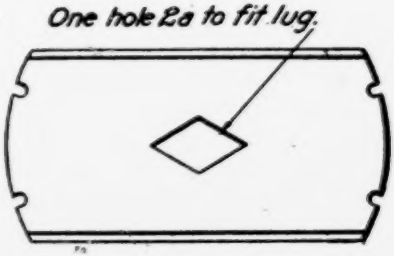
The gist of Gaisman's invention was the use of the blade to position the cap on the guard. *When defendant's blade is placed in plaintiff's razor, it is the sole means of positioning the cap on the guard* (Rec. p. 178, fol. 533–4). That this is true is proved by the fact that when the cap is placed on the guard of plaintiff's razor and there is no blade in the razor, the cap is free to move sidewise and is not held in shaving relation to the guard; but if the blade is put in place between the cap and guard, the cap cannot move sidewise but is held in proper relation to the guard as the clamping takes place. Having failed totally to comprehend this action and the relationship of the parts, Judge Manton came to two mistaken conclusions as to infringement of the claim which will now be pointed out.

Point 2. Defendant's blade has "a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member" or its mechanical equivalent. Judge Manton was wrong in holding that this was not the case.

The blade of the Gaisman patent has a single central diamond-shaped opening *2a* which fits over a corresponding diamond-shaped lug *1b* on the top of the guard. (See Figs. 2, 7, Rec. p. 226 and the sketch below.)

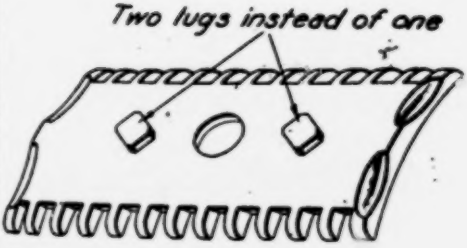


Guard of razor of Gaisman patent.

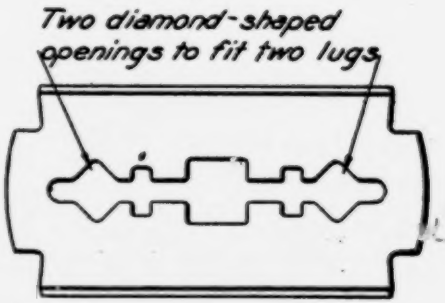


Blade of Gaisman patent in suit.

Defendant's blade (see right-hand sketch below) has two (instead of one) diamond-shaped openings which are spaced equidistantly from the center and are connected by a slot and a non-functional square enlargement big enough so that the screw stud on the cap will not interfere with the blade.



Guard of plaintiff's "Good-Will" razor



Defendant's blade.

The two diamond-shaped enlargements, with the connecting slot and square enlargement, are certainly centrally disposed and they fit on the two diamond-shaped lugs on the top of the guard (see left-hand sketch above) and hold the blade in shaving relation to the edge of the guard. Defendant has merely duplicated Gaisman's single diamond-shaped opening. Mere duplication of parts without change of function, or the division of the function of a single part between two parts which together perform it does not avoid infringement. See

Barber v. *Otis Motor Sales Co.*, 240 Fed. 723–729;
Line Material Co. v. *Brady*, 7 F. (2d) 48–51;
Nathan v. *Howard*, 143 Fed. 889, 893;
Standard Caster Co. v. *Caster Socket Co. Ltd.*, 113 Fed. 162–169.

We believe that the phrase of the claim "non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member" fairly describes the opening in defendant's blade; but, if it does not, then defendant's blade certainly has the mechanical equivalent of this element since the two diamond-shaped parts of its slot perform the same functions in the same way and are mere duplications.

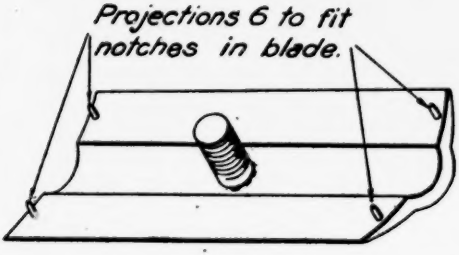
Seymour v. *Osborne*, 11 Wall. 516, 560;
Clough v. *Barker*, 106 U. S. 161, 177–8;
Kinloch v. *Western*, 113 Fed. 562.

Judge Manton was certainly wrong in holding that defendant's blade did not have this element of the combination.

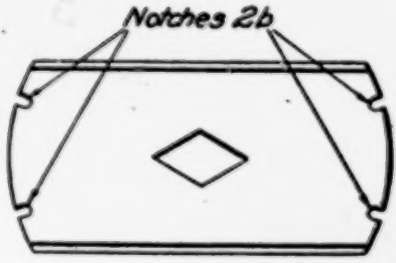
Point 3. Defendant's blade has "means spaced apart from said opening to cooperate with the clamping member to retain the latter in shaving relation to the blade independent of the guard member". Judge Manton was wrong in holding that this was not the case.

This part of the claim refers to the notches *2b* in the ends of the blade of the Gaisman patent (see Fig. 7 of the patent and the sketch below) and to the four projections 6 on the cap (see

Figs. 1 and 9 of the patent and the sketch below) which engage these notches. The function of the notches and projections is to hold the cap from swinging around while the parts are being clamped in final position by the screw stud and handle. The blade, therefore, by its connection with the projections 6, holds the cap in shaving relation to itself and to the guard member. The notches are in the outer edge of the blade and are, therefore, "spaced apart from" the central diamond-shaped opening.

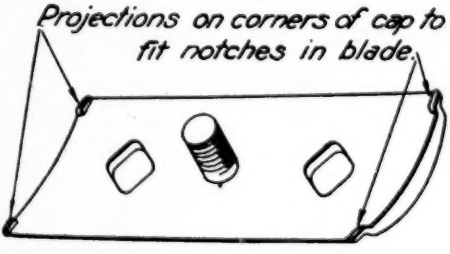


View of under side of cap of the razor of the Gaisman patent.

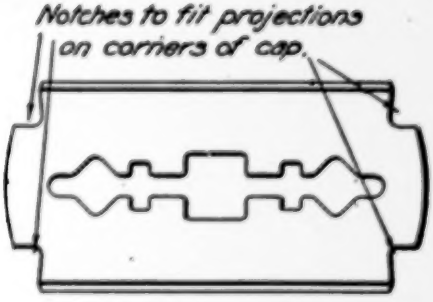


Blade of the Gaisman patent.

In defendant's blade the notches are placed at the corners of the blade because the projections on the cap of plaintiff's razor are located at its corners instead of at the ends. (See sketch below.) They are "spaced apart from" the central opening in the same way as the notches in the Gaisman blade are spaced apart from the central opening of that blade.



View of under side of cap of plaintiff's "Good-Will" razor.



Defendant's blade sold for use with plaintiff's "Good-Will" razor.

The corner notches in defendant's blade and projections on the cap when the blade is in place in the razor are the sole means for preventing displacement of the cap with relation to the blade and the guard. The defendant's blade, therefore, has the construction and mode of operation described by the phrase of the claim under consideration.

The Court of Appeals appears to have thought that there was some difference in the mode of operation between defendant's blade and the blade of the Gaisman patent in this respect. That this can not be true is conclusively proven by the fact that the cap of plaintiff's razor with which defendant intended its blade to be used is not definitely positioned when there is no blade in place in the razor but is definitely positioned when when the blade is inserted and is held in this position until the clamping is complete.

Defendant's blade is identical in mode of operation with the blade of the Gaisman patent. The changes in form do not change the mode of operation and are merely colorable.

We respectfully submit that the Court of Appeals for the Second Circuit was obviously and glaringly wrong in its conclusion as to infringement of claim 1 of the Gaisman patent.

We, again, respectfully call the attention of the Court to our brief in the companion case of *Gillette Safety Razor Company* v. *Standard Safety Razor Corporation*, No. 230 where the questions of the law of contributory infringement and the public policy involved are fully discussed.

We, therefore, respectfully submit that this case calls for the exercise by this Court of its supervisory powers in order that (as is pointed out in No. 230) the law relating to the contributory infringement of patents by the sale of replacement parts may be made clear, that uniformity of decision between the several cir-

cuits be established, and the Circuit Court of Appeals for the Second Circuit be required to conform to the decisions of this Court; and, to that end, that a writ of certiorari be granted.

Respectfully submitted,

GEORGE P. DIKE,
CHARLES NEAVE,
Counsel for Petitioner.

Boston, Massachusetts, July 11, 1933.